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THE GOVERNMENT'S CASE AGAINST THE STANDARD OIL COMPANY FOR ACCEPTING REBATES FROM THE CHICAGO AND ALTON RAILWAY COMPANY CONTRARY TO THE PROVISIONS OF THE ELKINS LAW.

The recent decision of Judge Landis in the government's case against the Standard Oil Company for violation of the Elkins Law, in accepting rebates from the Chicago & Alton Railway Co., is generally accepted as a wise and beneficent one. This decision finds the Standard Oil Company with knowingly violating the law 1,462 times and assesses against them the maximum fine of $20,000 for each offense. A fine of twenty-nine million two hundred and forty thousand dollars is not to be picked up in the street every day. Nevertheless, it is not incommensurate with the offense, especially as it is intended to be highly punitive. The effect on other combinations and corporations seeking rebates must necessarily be beneficent, for none of them but will fear such an execution of the law and beware of the conduct which may make it amenable to such a force.

For years laws have been enacted for the purpose of preventing unjust discrimination on the part of large corporations, and with every enactment there has come evasion. Recent articles in English papers have scored our inability to cope with corporate powers, and the opinion has gone abroad generally, that there had been a great decline in the proper administration of law in America, of which we recently made mention. This decision by Judge Landis will help to inspire the needed punitive force in other decisions and thereby restore in the public mind a confidence in our government in the due administration of the law.

While the fine imposed seems to be excessive, it is within the limitations of the statute, and, considering the fact that no corporation is said to have profited so largely by rebates as the Standard Oil Company, it cannot be said to be incommensurate with the offense. Judge Landis well knew that the people had a right to expect a judicial determination to equal the emergency, and having met it to the general satisfaction, has a right to expect the people to back up so just a judgment with such a will and spirit that it should in no way lose the force and effect which it was intended it should have on other corporations which have been evading the law. The manner in which an opinion is received by the people has a great influence upon its future stability, particularly when it is based upon a law which was intended to prevent injustice by preventing unfair competition. The general welfare of the nation was provided for by the law which the Standard Oil Company violated, so that in the size of the punishment meted out to it, the general welfare, not the spite of the judge who assessed the fine, was consulted and conserved. The Supreme Court of the United States will scarcely permit a lesser consideration to outweigh so great a consideration as the general welfare. *In praesentia majoris cessat potentia minoris.*

The statute known as the Elkins Law which covers the question of offering or accepting rebates from interstate carriers is as follows: "And it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept, or receive any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereto, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereto, or whereby any other advantage is given or discrimination is practiced. Every person or corporation who shall offer, grant, give, or solicit, accept or receive any such rebates, concessions, or discrimination, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine of not less than $1,000 nor more than $20,000." Then followed provisions for publication. We can not hope to cover the whole of the opinion in this editorial, but a few portions of it will give a fair view of the whole situation:

"This is a prosecution of the Standard Oil Company of Indiana for alleged violations o the Act approved Feb. 19, 1903, known as th

Elkins law. The charge is that the defendant's property was transported by the Chicago & Alton Railway Co. at rates less than those named in the carriers' tariff schedules, published and filed with the interstate commerce commission, as required by law. The offenses are alleged to have been committed during the period from Sept. 1, 1903, to March 1, 1905. The indictment contains 1,903 counts, each charging the movement of a car of oil. Certain of the transportation is alleged to have been from Whiting, Ind., to East St. Louis, Ill., the remaining counts covering transportation from Chappell, Ill., to St. Louis, Mo. The plea was 'not guilty.' On the trial 441 counts were withdrawn from the consideration of the jury on grounds not going to the ultimate questions involved in the case. On 1462 counts the verdict was 'guilty.' Motions for a new trial and in arrest of judgment having been overruled, the matter is now before the court for the imposition of the penalty authorized by law. * * * The defendant maintains that the interstate commerce law does not apply to the Alton company's connection with the transportation of defendant's property, inasmuch as the road it operates lies wholly within the state of Illinois. The theory is that the haul by the Chicago Terminal from Whiting across the Illinois line to Chappell, and the haul by the St. Louis Terminal from East St. Louis across the Missouri line to St. Louis are each interstate, and therefore subject to federal control, but that the Alton company's interstate haul of the same property from Chappell to East St. Louis is beyond the reach of the federal authority. The trouble with this contention is that it ignores the basic proposition underlying the whole question and confuses the intrastate character of the carrier with the interstate character of the commerce in which the carrier is engaged. The true and primary test is whether the commodity to be transported is to pass from one state into another state. If it does so pass, then it is interstate commerce, regardless of whether the rails over which it moves be operated by one or many carriers. And when this commodity begins to move, interstate commerce has begun, and interstate commerce it continues to be until it reaches destination. * * If in such continuous line there be a road lying wholly within a county in a state, the carrier operating such road, in respect to the movement of that commodity, is engaged in interstate commerce as clearly as if its line extended from the origin to the destination of the shipment, and is therefore as to such transportation subject to federal control. To adopt the views contended for by defendant, namely, that congress may prescribe the rate which the shipment must pay for the movement from Whiting to Chappell, and from East St. Louis to St. Louis, and that the legislature of Illinois may prescribe the rate effective on the link connecting these two ends of the route traveled by the commodity would be to create a situation impossible in practice as it is illogical in theory."

A peculiar and interesting question in the case was raised by the offer of the Standard Oil Company to prove that they did not know that a different rate from that accepted by them had been filed by the Chicago & Alton Railway Company with the Interstate Commerce Commission. Under the Elkins Law, as it stood in 1903, the word "knowingly" was not incorporated in the section charging the offense; this was added at the last session of congress by the Hepburn Rate Bill. The distinction is important, as the Standard Oil Company in the principal case was indicted for acts committed before the Hepburn amendment went into effect. The Standard Oil Company claimed that it had no knowledge of the fact that the Chicago & Alton Railway Company had not duly filed and published the rate it charged, but supposed, and claimed that it had a right to suppose, in view of what was told it by its traffic manager, and in view of the fact that the other roads were charging the same rate, that it was paying the Alton a lawful rate. It offered to prove all this, but the prosecution being under the Elkins law as enacted in 1903, and not under the Elkins law as it stands today, the court ruled that the Standard Oil Company was bound to know what the lawful rate was, the same as it was bound to know any other law, for a rate duly established is but a law, and, therefore, refused all testimony tending to show that the Standard Oil Company did not know that it was receiving the benefit of a rate that had not been lawfully established. If the prosecution had been under the Elkins law as it now stands this testimony would clearly

have been competent, and if it had been sufficient to satisfy the jury there could not have been any conviction in the first place, and in the second place there could not have been a fine of $29,240,000. "We fear," says Senator Foraker in a recent address, "that the government will in due time find that the Elkins law as it was amended by the rate bill has been weakened and not strengthened, for as to all offenses since the passage of the Hepburn law there cannot be fine, forfeiture or imprisonment, except only in cases where the offenses have been knowingly committed."

NOTES OF IMPORTANT DECISIONS.

CRIMINAL TRIAL—NECESSITY OF PRESENCE OF ACCUSED AT EVERY STAGE OF A CRIMINAL PROCEEDING.—It is no merely technical requirement which has come down to us from our fathers that a person on trial for the alleged commission of a crime shall be present at every stage of the proceeding. And this rule cannot be partially infringed as was done by the trial court in the recent case of Pierce v. State (Tenn.), 103 S. W. Rep. 780, by confining the prisoner in an adjoining room and permitting him to peer through an open doorway, while the verdict is being announced, without invalidating the entire proceedings.

In the principal case the accused was convicted of murder. When the verdict was announced, he was in a room adjoining the courtroom handcuffed to another prisoner. He was not in sight of the judge, and could not see all of the jurors. The door of the room was being held open by the sheriff, who obstructed the view of accused by standing in the doorway. The Supreme Court of Tennessee held that by such action on the part of the court the accused was deprived of his constitutional right to be present in court at his trial.

The court, in the course of a very interesting opinion, gives a careful *resume* of the decisions of the courts conserving this very important right of a defendant. The court said: "The potent fact in this case, which is undisputed, is that at the time the jury returned its verdict the prisoner was in another room, handcuffed to another prisoner, and not in sight of the trial judge. While the court finds that the door was open, it was being held open in some fashion by a deputy sheriff, who claims to have held it open with his head. It is admitted that the sheriff himself was in the doorway, thus obstructing the view of the prisoner, who was sitting on a bench in the prisoner's chamber, handcuffed in the manner already described. It is also admitted that while the prisoner, from his position, could see some of the jury, he could not command a view of the entire jury. Finally it is admitted that the prisoner, from his position, could not see the trial judge; nor could the trial judge see the prisoner. These admitted facts are utterly subversive of fundamental and constitutional rights guaranteed a prisoner on trial for his life or liberty. It is well settled that it is essential to a valid trial and conviction on a charge of felony that the defendant shall be personally present, not only when he is arraigned, but at every subsequent stage of the trial, unless he may and does waive his right to be present. Accordingly it has been held that defendant must be present at the arraignment and plea (Hall v. State, 40 Ala. 698); at the impaneling and swearing of the jury (Rolls v. State, 52 Miss. 391); at the discharge of the jury because of the sickness of a juror of inability to agree (State v. Smith, 44 Kan. 75, 24 Pac. Rep. 84, 8 L. R. A. 774, 21 Am. St. Rep. 266; State v. Wilson, 50 Ind. 487, 19 Am. Rep. 719); during the examination of witnesses or the reception of other evidence (People v. Kohler, 5 Cal. 72); when the court charges the jury and when they are recharged or given additional instructions after retirement (Bonner v. State, 67 Ga. 510); when the case is finally submitted to the jury (Allen v. Commonwealth, 86 Ky. 642, 6 S. W. Rep. 645); when the verdict is received or amended (Waller v. State, 40 Ala. 325; State v. France, 1 Overt. 434; Clark v. State, 4 Humph. 254; State v. Jones, 2 Yerg. 22; Andrews v. State, 2 Sneed, 550; Hutchinson v. State, 3 Cold. 95; Witt v. State, 5 Cold. 15; Stewart v. State, 7 Cold. 338); and when sentence is pronounced (Cole v. State, 10 Ark. 318; Harris v. People, 130 Ill. 457, 22 N. E. Rep. 826)."

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In considering this question it will be well to bear in mind what is meant in the commercial world by the term "trust," and how

trusts and monopolies are treated by the common law. A combination of several corporations has in recent years taken the once honored name of "trust," because in such case all the wealth of the combined corporations is placed under the management of a single set of trustees. A large aggregation of wealth under the control of one set of trustees enables the combination to destroy competition and become a monopoly. But a combination of several persons (individual or corporate) for the purpose of destroying competition and monopolizing some necessary or convenience of life, has always been treated by the common law as a menace to the publicwelfare, against public policy and illegal. It cannotbe too often stated or too forcibly emphasized, that trusts and monopolies are "against the common law;" that they can not legally exist in the absence of positive legislation in their behalf; that there is no such thing as a legal trust, or a legal monopoly, without "paternal" legislation. A state, however, can legalize trusts and monopolies as well as other evils. The state, if so disposed, could license lotteries, gaming houses and race track gambling, as well as Sunday and all night saloons.

Defeated by the courts on common law principles, combinations for the destruction of competition go to a state (New Jersey for instance) and procure from the legislature authority to transform themselves into single corporations with such large aggregations of corporate wealth as enable them to buy up, or crush out, all competing corporations. The centralization in a single corporation (like the Standard Oil Company) of a hundred million dollars or more, by state authority, is the club used at the present time for the destruction of competition. And when competition is destroyed the corporate combination becomes a monopoly. Trusts and monopolies cannot be prevented without putting reasonable limits to the aggregations of corporate wealth now authorized by state legislation. New Jersey will not put such limits, and the general government cannot, without an amendment to the constitution of the United States empowering congress to prevent and suppress monopolies throughout the United States by appropriate legislation.

In the meantime, must the general government continue to recognize the monopolistic corporations created by New Jersey as citizens entitled to use the federal courts for the enforcement of their claims throughout the United States? If the state of Texas, under her constitution, providing that "monopolies are contrary to the genius of a free government, and shall never be allowed," can prevent monopolies organized in another state from invading her state courts and compelling their aid in the enforcement of their claims—if Arkansas, Tennessee and North Carolina under like constitutional provisions, and other states, in accordance with their common law public policy, can prevent such invasion, why cannot the general government refuse to recognize New Jersey monopolies as citizens, and refuse to give them the aid of the federal courts? This brings us back to the consideration of the question, stated in the beginning of this article: "Is the general government obliged to allow trusts and monopolies to sue as citizens in the federal courts."

The fourteenth amendment of the constitution of the United States declares who are citizens as follows: "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside." These are the only two methods in which one may become a citizen of the United States; first, by birth therein; second, by naturalization. This amendment has reference only to natural birth and to national naturalization. Congress is empowered "to establish an uniform rule of naturalization."[1] The exercise of this power by congress is exclusive of the exercise of a like power by the state. The states do not naturalize though they may confer special privileges upon aliens.

The Supreme Court of the United States has directly held that a corporation is not a citizen within the meaning of the provision of the constitution which declares that, "the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."[2] The term "citizens" as there used applies only to natural persons, members of the body politic owing allegiance to the state, not to artificial persons created by the legislature, and possessing only the

[1] Art. 1, sec. 8, cl. 4.
[2] Art. 4, sec. 2.

attributes which the legislature has prescribed.[3]

It may be claimed, however, that a corporation is a citizen within the meaning of the judiciary article of the constitution. That article is as follows: "The judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish." * * * "The judicial power shall extend to * * * controversies * * * between citizens of different states."[4]

In the consideration of this article, the supreme court during the time of Chief Justice Marshall held that "a corporation aggregate, composed of citizens of one state, might sue a citizen of another state in the circuit courts of the United States; that is, they in effect decided that although the artificial being, a corporation aggregate, was not a citizen, as such, and therefore could not sue in the courts of the United States, as such, yet the court would look beyond the mere corporate character, to the individuals of whom it was composed; and if they were citizens of a different state from the party sued, they were competent to sue in the courts of the United States; but all the corporations must be citizens of a different state from the party sued." Such was held to be the law as early as 1809 and as late as 1840.[5]

Afterwards the supeme court took another step in favor of corporations, and held that "where a corporation is created by the laws of the state, the legal presumption is, that its members are citizens of the state in which alone the corporate body has a legal existence; and that a suit by or against a corporation in its corporate name, must be presumed to be a suit by or against citizens of the state which created the corporate body; and that no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the court of the United States."[6]

[3] Paul v. Virginia, 8 Wall. 168; Western Turf Association v. Greenberg, 27 Sup. Ct. Rep. 384, decided February 25, 1907.

[4] Art. 3, secs. 1, 2.

[5] The Bank of the United States v. Deveaux, 5 Cranch, 61; The Bank of Vicksburg v. Slocumb, 14 Pet. 60.

[6] See Ohio & Miss. R. R. Co. v. Wheeler, 1 Black, 286; Thomas v. Board of Trustees, 195 U. S. 207.

By this legal fiction or judge-made law, citizens of Ohio, Pennsylvania and New York are conclusively presumed to be citizens of New Jersey when they are in the federal courts as members of a New Jersey corporation. The supreme court has more than once admitted that this doctrine of indisputable citizenship "went to the very verge of judicial power." Thus in St. Louis & S. F. R. Co. v. James[7] the court say: "We are unwilling to sanction such an extension of a doctrine which went to the very verge of judicial power. That doctrine began, as we have seen, in the assumption that state corporations were composed of citizens of the state which created them; but such assumption was one of fact, and was the subject of allegation and traverse, and thus the jurisdiction of the federal courts might be defeated. Then after a long contest in this court, it was settled that the presumption of citizenship is one of law, not to be defeated by allegation or evidence to the contrary."[8]

But notwithstanding this doctrine (involving as it does a legal fiction or judge-made law) the question still remains to be considered: Are combinations of presumed citizens of New Jersey in the form of a trust or a corporate monopoly, entitled, by an undeniable, constitutional right, to bring suits in the federal courts for the enforcement of their claims against citizens and corporations of the other states. "Except in the few cases of which the supreme court is authorized to take cognizance, it is necessary that the courts shall be created by congress, and their respective jurisdictions defined; and in creating them, congress may confer upon each so much of the judicial power of the United States as to its wisdom shall seem proper and suitable, and restrict that which is conferred at discretion. In doing so it may apportion among the several federal courts all the judicial power of the United States or it may apportion a part only, and in that case what is not apportioned will be left to be exercised by the courts of the states."[9]

Does it not follow that congress, in the exercise of such power, may provide by law that, in the class of cases where the jurisdic-

[7] 161 U. S. 545, 563.

[8] See also Doctor v. Harrington, 196 U. S. 579, decided February 20, 1905.

[9] Cooley, Constitutional Law, 126.

tion depends upon a controversy between citizens of different states, the corporations of each state must comply with such requirements as to publicity of transactions and such restrictions as to aggregations of corporate wealth, as may be prescribed by federal law, before they shall be allowed to enforce in the federal courts their claims against the natural and corporate persons of the other states? If congress can (as it now does) constitutionally withhold from the natural citizen of the state, the aid of the federal courts in enforcing his claims against citizens and corporations of the other states, unless "the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars," why may not congress constitutionally withhold from corporate judge-made citizens of the state, the aid of the federal courts in enforcing their claims against citizens and corporations of the other states unless they comply with such requirements and restrictions as to publicity and aggregations of corporate wealth as may be prescribed by federal law? From a constitutional point of view, in so far as the ability to sue in the federal courts is concerned, the corporation with a capital of a hundred million is just as dependent upon the action of congress as the natural person the whole amount of whose fortune is less than two thousand dollars. With the power in congress to withdraw from the artificial beings created by a state the aid of the federal courts unless they conform to prescribed conditions, all the corporations endowed by a state with capacity to aggregate such enormous sums of corporate wealth as enable them to monopolize the industries of the country can be remitted to the state courts and left there for the enforcement of their claims, in company with the natural person whose claim is less than two thousand dollars. Such a course should be satisfactory, not only to the sincere advocates of state rights, but also to all those who so arrogantly denounce federal "paternalism" in all its forms, legislative, executive and judicial.

In any view of the case, congress, as the legislative department of the general government, has control of the rules of evidence in so far as they relate to the proof of citizenship in the federal courts. Congress can annul the judicial "paternalism" which legalizes a fiction, and can reaffirm the John Marshall doctrine and declare that no corporation created by a state shall be entitled to sue citizens and corporations of a different state in the federal courts unless the individuals of which it is composed are really citizens of the state which created the corporate body. Such legislation would prevent citizens of Ohio, Pennsylvania and New York—the notorious millionaires of Cleveland, Pittsburg and New York City, from aggregating their immense wealth under the false guise of New Jersey citizenship. They would have to migrate to New Jersey and become actual citizens of that state before they could band together and have the aid of the federal courts in their predatory operations in the other states. And if they should do this, the people of the other states, seeing the most important industries of the country in subjection to the will and pleasure of a few multi-millionaires of a single state, would soon be ready and anxious (as they should be now) to adopt an amendment to the constitution, empowering congress, the common representative of all the states, "to prevent and suppress monopolies throughout the United States by appropriate legislation."

R. M. BENJAMIN.

Bloomington, Ill.

DIVORCE—WHAT CONSTITUTES DESERTION.

PFANNEBECKER v. PFANNEBECKER.

Supreme Court of Iowa, Feb. 15, 1907.

Under Code, § 3174, either husband or wife may obtain a divorce where the other willfully deserts or absents himself from the party complaining without reasonable cause for two years.

The refusal of a wife to have sexual intercourse with her husband cannot be regarded as a desertion of him, where they continue to live in the same house.

The physical condition of a wife held such as to justify her in declining to have sexual intercourse with her husband.

LADD, J.: The parties hereto were married September 2, 1891, and lived together happily until July, 1897. One child, Grace, was born in 1896, and the other, Malcolm, in 1898. This action was begun in September, 1905, and resulted in a decree of divorce in favor of the husband with the custody of both children and the exclusion of the wife from the home with a monthly stipend for support money. The relief granted was based on two grounds: (1) That the wife had willfully deserted her husband by declining to have

sexual intercourse with him for a period of two years; and (2) that she had been guilty of cruel and inhuman treatment such as to endanger his life. These will be considered in the order mentioned.

1. The parties continued to live in the same house and slept in adjoining rooms up to the time the action was begun. She denied cessation of intercourse prior to April, 1905, while he testified that this had not occurred since April, 1903. Every opportunity was afforded as they continued to have free access each to the bedroom of the other. Indeed, his testmony is utterly without corroboration, save in her aversion thereto, owing to causes hereinafter mentioned, and the testimony of a neighbor that defendant had told her that she did not desire any more children and had locked her door since Malcolm was born as the safest preventative. Even if she said this, the parties are agreed that it was not so. The situation illustrates the difficulties involved in such proof were denial of sexual indulgence alone to be regarded as a ground on divorce. The language of our statute precludes us from so holding, were we inclined, and we are not, for a divorce is authorized on this ground only "when he willfully deserts the wife and absents himself without reasonable cause for the space of two years." Section 3174, Code. This statute is equally applicable where the wife deserts the husband. It is not sufficient that one duty or that all save one be neglected. There must be a complete separation of the parties by the one absenting himself or herself from the other. The ecclesiastical courts which formerly exercised jurisdiction in matrimonial cases in England did not sever the ties of marriage on the ground of desertion, but undertook the restoration of conjugal rights only. In so doing distinction was made between marital cohabitation and sexual intercourse; the courts going no further than to restore the former. The remedy for desertion in this country is divorce, but to constitute desertion it would seem that that must be lost which the ecclesiastical courts were able by their decrees to restore, namely, marital cohabitation, and such is the voice of the great weight of authority. Fritz v. Fritz, 138 Ill. 436, 28 N. E. Rep. 1058, 14 L. R. A. 685, 32 Am. St. Rep. 156; Segelbaum v. Segelbaum, 39 Minn. 258, 39 N. W. Rep. 492; Schoessow v. Schoessow, 83 Wis. 553, 53 N. W. Rep. 856; Throckmorton v. Throckmorton, 86 Va. 768, 11 S. E. Rep. 289; Steele v. Steele, 1 McArthur (D. C.), 505; Anonymous, 52 N. J. Eq. 349, 28 Atl. Rep. 467. See, also, Stewart v. Stewart, 78 Me. 548, 7 Atl. Rep. 473, 57 Am. Rep. 822, and Southwick v. Southwick, 97 Mass. 327, 93 Am. Dec. 95, where it is held not to constitute "utter desertion." 14 Cyc. 612. There are respectable authorities to the contrary, but construing statutes essentially differing from that of this state. See Fink v. Fink, 137 Cal. 559, 70 Pac. Rep. 628; Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. Rep. 543; Evans v. Evans, 93 Ky. 510, 20 S. W. Rep. 605. These decisions seem to have been unduly influenced by the opinion expressed by Mr. Bishop in his work on Marriage and Divorce, §§ 778, 779, and which has not been followed by the better considered cases. In none had a statute expressly making the absenting of the spouse essential to constitute desertion been so construed, and which, as we think, leaves no escape from the conclusion that cohabitation as well as marital intercourse must be abandoned to constitute such desertion as will entitle the unoffending spouse to a decree.

2. There is another reason in this case for denying a divorce on the ground of desertion. This, to support the decree, must have been without reasonable cause, and, if it were to be conceded that the wife declined to indulge the plaintiff's passions, her physical condition was such as to justify her in so doing. In giving birth to the first child the neck of her womb was lacerated, and, although this may have been repaired, as testified by plaintiff, it is reasonably certain that it was not restored to its normal condition. She testified to a discharge ever thereafter, and that intercourse often was painful and followed by hemorrhage. He admitted that she sometimes complained of suffering pain. This to one not skilled in medicine would plainly indicate a condition requiring further repair, but plaintiff though saying he examined the parts, discovered nothing wrong. She denied that any examination was made and is strongly corroborated by the circumstances. After the birth of the second child she became exceedingly adverse to intercourse, and the cause was not discovered until examination by Dr. Oliver, September 21 or 22, 1905. He testified: "I found the neck of the womb torn and very tender, with a patch of granulations about the size of a five cent piece, the right upper prolapsus tender and enlarged, and she complained of pain in her right side, just below and anterior to the right shoulder, to the front of the shoulder, and also on the right side of the neck. Her pulse was 72. That was the side where the breast was removed. Her temperature was 98, and she was quite nervous. I said, 'torn;' it means the same as laceration. The trouble probably continued from one of her confinements, which one I could not say. The unlcer occupied the space of the mouth of the womb about the size of a five-cent piece. The mouth or whole cervix is about as large as a 25-cent piece. The cervix means the lower end of the womb. There was some discharge from the ulcer. The birth of a child is the commonest thing to cause laceration. It could be caused by other causes. It could be caused by manual disturbance, or sometimes caused by delivering a large tumor. The symptoms which usually accompany laceration of the womb are tenderness, the lips of the cervix all worked out, making it tender, with a discharge, with granulations or inflammation. I would expect that coition would be painful in defendant's case. It was tender over the right ovary. That tenderness might have been produced by some slight inflammatory ac-

tion. It probably followed from the laceration of the womb. The inflammation of the ovaries frequently happens from lacerations. The majority of patients are nervous and get more nervous the longer standing the case is. If long continued, it will seriously affect the health of the patient. The patient is inclined to be irritable. I think it has affected the defendant both in a nervous and in a physical way. Some patients have desire for sexual intercouse, and some do not. The longer these troubles are allowed to run the more effect they have on the nervous system."

Cross-examination: "I should think that intercourse would be painful under the conditions I found existing in this case. I think it would cause aversion to intercourse. I would not expect patients to solicit intercourse, nor advise them to have it. * * *"

Re-direct examination: "Under the condition I found existing, blood would sometimes follow the act of intercourse." This evidence is undisputed, save by the plaintiff's claim that he had examined defendant and discovered nothing of the kind, to which, as previously intimated, in view of what has been mentioned and Dr. Oliver's testimony, we are not inclined to give credence. A more reasonable explanation is that the defendant, becoming engrossed in the practice of his profession and money-getting and wearied by the complaints and fault-finding of her whom he had promised to cherish in sickness as well as in health, neglected to give her ailments the care and attention her condition demanded, and as a consequence much that he now complains of happened. To what has been said should be added the fact that she underwent a surgical operation in the removal of a breast in January, 1894, and we have a very satisfactory showing of a reasonable cause for declining conjugal intercourse.

3. While defendant's physical condition cannot excuse her for extreme cruelty, it is proper that it should be taken into consideration in weighing her conduct. The plaintiff has gathered the disagreeable things in their married life since 1897 and recited them in detail. They exhibit his wife as an extremely jealous and somewhat selfish individual. From the fact that all went well with them prior to this time it may be inferred that her physical difficulty in gratifying her husband may have influenced her suspicions of his infidelity. She conceded at the trial that these things were without foundation, but not that her accusations were insincere at the time of making them. Morever, the record plainly indicates that she is a somewhat eccentric woman. Of her peculiarites in this respect the plaintiff is not in a situation to complain. He took her as she was, for better or for worse. With the further observation that there was no proof of physical violence, actual or threatened, and that the reliance for relief necessarily rests upon the prospective effect of defendant's somewhat persistent nagging and accusations of infidelity upon plaintiff's health, we may advert as briefly as may be to the main charges lodged against her, as bearing upon the two inquiries: (1) Whether these were cruel; and, if so, (2) whether the life of plaintiff was endangered thereby.

In July or August, 1897, upon her invitation, a young lady friend visited her, accompanied by a baby sister. The child was taken sick with scarlet fever. Defendant demanded her immediate removal from the house. The plaintiff isolated her with the sister and her mother, who came to care for the child, in an upper room and treated her until she had recovered. The evidence is in conflict as to whether she declined to furnish food for them or they refused to receive it, and she objected to the neighbors bringing eatables. Certain it is that she accused her husband of being unduly intimate with the young woman, and when the latter departed told her never to return to her house again. At a later date she objected to him treating a woman some 55 years old because not responsible with the intimation that their relations were improper, and in 1903, owing to her objection that he was "too thick" with the woman's daughter, he was compelled to give up an engagement to assist in an operation on the latter. In 1898 he claimed, and she denied, that she accused him of being unduly intimate with a trained nurse who had cared for her in confinement, and upon his report that his sister had given birth to another child he says she denounced his brother-in-law as a bull, while she attributes worse language to him. When he returned from his office late, she would inquire what woman he had been entertaining there. When the children were sick in 1902, she objected to plaintiff entering Malcolm's room while the nurse was there. He claimed and she denied, that she frequently inquired of the children who were at his office. She criticised a couple of ladies for stopping in his office while waiting for the lodge on the floor above to open, and said if she had known to whom a plant, left in his office until it was called for, belonged, she would have thrown salt on it. On one occasion, upon his return from a medical meeting, she denounced doctors as butchers and cut-throats. He claimed, and she denied, that she repeatedly referred to women patients of good repute as "dirty things," and like designations, and declared that, if he could not make a living without working for them, he ought to go and shoot himself. After the operation in 1904 she said little or nothing to him for several months; would often leave the room when he entered. She had told the children that she would not attend the World's Fair at St. Louis, but upon discovering that her husband, in taking them, would be accompanied by two other families, changed her mind 24 hours before starting and went. He took a seat with other ladies of the company, and upon falling asleep his hat fell in the lap of a widow, who held it. Defendant noticed this and chided him. Upon reaching St. Louis she concluded that she was unable to be on her feet long enough to go over the fair

grounds, and on the second day departed for a visit with her mother at Centralia. She requested plaintiff to stop for her on his way home, which he did, and found that she had left the day before. She explained this by saying that her mother was called to the deathbed of another daughter, and she did not wish to remain after her departure. Later she accused defendant of having paid the expenses of the widow to the fair. She insisted that women who were his patients wore their best dresses on the streets to show off, and that they ought to be at home attending to their families. At other times she declared that but for their sexual excesses they would not need treatment. She denounced his employees as immoral, and found fault with a tenant's character, saying, as he testified, that she hoped that the building "would go up in smoke." Undoubtedly she regretted her second pregnancy. But what he claims she said, which she denied, does not indicate that she did more than give an intimation of the desirablity of an abortion. The record fails to show a purpose to have an abortion committed. He testified that she persisted in talking to him of these matters far into the night; that, when he would express the desire to go to sleep, she would say, "You've got to take it; you can't go to sleep; you have got to hear what I am going to say." She denies all this, but admits going to his room freely when he had retired, but claims never to have remained after he expressed a desire to go to sleep. Plaintiff also related that at one time when Malcolm was putting on his gown she said: "I hope Malcolm will never need another gown;" that in the following morning, upon inquiry as to her meaning, she explained "that there is nothing in this world for him." Shortly after this she said to plaintiff in a conversation that she could kill him, and later, after he had retired and she had been in his room talking and he had fallen asleep, she returned, when he heard a noise, awakening him with a start. He immediately turned on the light, and saw her standing about two feet from the door, and asked, "What do you want?" To which she responded, "You don't need to be afraid; I won't hurt you." This, according to plaintiff, greatly shocked him. The defendant did not recall the circumstance of entering his room, and satisfactorily explained the other incident. She discouraged him in his profession and sought him to abandon it. She objected to his absence from her, more especially when sick. Plaintiff repeatedly warned his wife that, if she persisted in her accusations, it would be impossible for him to live with her. At first she asked forgiveness, and did better for a time. Upon their return from the World's Fair he testified she declared that, if he was going to get a divorce, she would do something that would ruin his practice, while she insists that she merely suggested a separation without a divorce. According to the doctor he never talked back save to answer her questions.

Enough has been said to indicate the character of defendant's treatment, without adverting to her insinuations as to some of his patients, her alleged neglect in preparing meals for him, her insistency that he obtain meals nowhere else, and possibly some other matters. The plaintiff's evidence was somewhat corroborated by the testimony of his sister that defendant had said to her that she used to think she could not see the children get sick and die without their father, but could now, and that she thought he was running after other women, and that if he was and some one shot him, she would not shed a tear; by that of Mrs. Kracht, who in cautioning children in front of the house not to throw water from the hose into the road, as this would scare her horses, had said to them, if they did, she would tell their father, whereupon defendant said: "You will tell his papa, will you? He will soothe all your trouble for you;" by that of Mrs. Wagner that she did not want more children, and therefore locked her door as the best prevention, and advised her to do the same, and that she had heard her say as much to another, that she thought the doctor unduly intimate with other women, and aimed to be at his office Wednesday and Saturday afternoons, as there were certain ladies she desired to watch, that he did not do as much as he could in treating the witness and others, and that she thought the profession unclean (this witness says she often thought defendant's mind not right); by that of Gus Kracht that she arranged a meeting with him at the office and inquired if plaintiff had paid the expenses of the widow to the World's Fair; by that of Mrs. Moore that, when the neighbors brought the eatables when the child was sick with scarlet fever, she ordered them away, and that she prepared an article for publication concerning that case, and that she heard the remark to Mrs. Kracht; by that of Eva Fish, who worked for her eight months, that she expressed a wish the doctor would give up his practice, and that a certain young lady would stay away from his office, but that she did not hear her criticise him otherwise; by that of Neuman that plaintiff had grown pale and more forgetful and thinner in the last few years. It will be noted that the only material corroboration of plaintiff's testimony is of the accusations of infidelity to his marriage relations. His claim that she robbed him of sleep by compelling him to listen to her talk nearly every evening until far into the night is entirely uncorroborated, and, though she may have been exceedingly annoying at times, we are not inclined to think he was in danger of being talked to death. Nor are her aspersions on the medical profession and request that he abandon it entitled to much consideration. When in ill health she doubtless felt, without duly appreciating the demands of his profession, that he ought not absent himself from her and told him so. Otherwise what she said was connected with the accusation of infidelity which in

the last analysis constitutes the only basis for a finding of legal cruelty.

We have repeatedly held that such accusations of the wife, by the husband, when malicious and unfounded, may be such cruelty as to endanger life. Evans v. Evans, 82 Iowa, 432, 48 N. W. Rep. 809; Haight v. Haight (Iowa), 82 N. W. Rep. 443. The difference in the situation of the husband is manifest. If innocent, he is not likely to regard seriously idle suspicions, even though lodged against him by his wife, nor is the effect on his character and position in society to be compared to that upon a female. On this ground the Supreme Court of Texas has held this charge against the husband does not amount to cruelty, unless it is shown that from his temperament or calling it has or will be likely to produce mental suffering beyond the ordinary effect which such a charge would naturally have upon a man. McAllister v. McAllister (Tex.), 10 S. W. Rep. 294. In Carpenter v. Carpenter, 30 Kan. 712, 2 Pac. Rep. 122, 46 Am. Rep. 108, the wife not only accused the husband of infidelity to the marriage relation, but sought for scandal, affecting his moral standing, to humiliate him in his own estimation, and to disgrace him in the opinion of all good people, and her conduct was adjudged to amount to extreme cruelty. In Kline v. Kline (Mich.), 13 N. W. Rep. 800, the charge of adultery was coupled with other abuse indicative of ungovernable violence of temper. See, also, Holyoke v. Holyoke (Me.), 6 Atl. Rep. 827; Robinson v. Robinson, 66 N. H. 600, 23 Atl. Rep. 362, 15 L. R. A. 121, 49 Am. St. Rep. 632. Whether one spouse has been so treated by the other as to endanger his life is a pure question of fact. It cannot be declared as a matter of law that any particular treatment will constitute such cruelty. A course of conduct which would so impair the health of one person as to endanger life might produce no effect on another of different aspirations and sensibilities. Most men, if innocent, would decline to treat seriously idle chattering about their relations with the opposite sex, while others, owing to their associations and different temperaments, might chafe more or less seriously under an unjust charge of this kind. As to whether this feature of the case alone seriously disturbed the plaintiff, the record is silent. Possibly this was because the defendant went no farther than to indicate her suspicions, and these, as expressed to others, save in one instance, did not reach plaintiff. He attributes his change of health generally to "the trouble at home," and testified that his nervous system was wrecked, and that he had become troubled with insomnia and forgetfulness as a result. This as seen finds scant support in the record, which indicates, also, that he is a man of strong physique and not of an especially nervous temperament, and not such a person as would be likely to be much troubled over his wife's unfounded suspicions. Undoubtedly he was greatly annoyed by her talk, and possibly his fears may have been unduly aroused by her appearance in his bedroom on one occasion. But these were unfounded, and, though he may rue his bargain in marrying a woman somewhat eccentric in character and too much given to fault-finding, he is in the situation of many another husband as well as wife who bears the matrimonial yoke under like conditions in philosophic endurance. For such, when this does not amount to legal cruelty, the law affords no relief. True it is that words and deportment may work injury as deplorable as violence to the person. One of Shakespeare's characters is made to say, "I will speak daggers to her, but use none."

We are satisfied, however, upon a separate examination of the entire record that the evidence falls far short of showing that a continuance of the marriage relation by these parties will be attended with any danger to the plaintiff's life, and that, with the restoration of defendant's health, which, with appropriate treatment, seems probable, much that has been objectionable in her conduct would be obviated. She may continue to talk more than wisdom dictates, but divorce cannot be made the panacea for the infelicities of married life. If disappointment, suffering, and sorrow even be incident to the relation, it must be endured. The marriage yoke cannot be thrown off merely because it rides unevenly. The petition should have been dismissed. Appellee's motion to dismiss is merely a renewal of a like motion previously overruled and is likewise overruled, as is also appellant's motion to strike appellee's additional abstract. Appellant is allowed the sum of $150 with which to compensate counsel for prosecuting this appeal, and the same will be taxed in her favor as a part of the costs of the case. Reversed.

NOTE.—*Denial of Conjugal Rights as Cause for Divorce on Ground of Desertion.*—After most careful examination of the authorities and of the principles of law governing the marriage relation and its ultimate object and purpose, we cannot bring ourselves to agree with the court in the principal case in its statement of the law that the refusal of a wife to have sexual intercourse with her husband cannot be regarded as a desertion of him, where they continue to live in the same house. This rule presupposes, although the court does not so state, a condition of savagery to exist where the husband, the stronger of the two contracting parties, can, if the wife do not actually desert his bed, force her to a compliance with her duty toward him and society when she voluntarily entered into the marriage relation. Such a rule may be applicable to conditions of society in Timbuctoo or the island of Moro, but it cannot obtain in society where women are exalted and men regard themselves and other men with contempt when they are asked to lay violent hands on a woman. A woman is just as safe from enforced consent to sexual intercourse at the hands of her husband, if he be a gentleman, as well in the same room with him as if he were a thousand miles away; and *vice versa*, a woman can desert her husband's bed by absolute refusal to have any intercourse whatever with him whether she remain under the same roof with him or should fly to the farthest corner of the earth and hide herself forever from him

in parts unknown where he might never follow. When it is considered that the highest purpose of the marriage relation, both by divine injunction as well as by a universal public opinion, is that the two persons thus united "shall be fruitful and multiply," it stands to reason that, on grounds of public policy as well as a proper construction of the statutes defining desertion, either party to a marriage relation who absolutely and without good reason refuses to perform the highest duty enjoined upon both parties to that relation, should be held to have absolutely deserted the other spouse and thus forsaken the relation. While the authorities are not agreed on this proposition we believe that the best reasoned decisions and the greatest jurists of our time support the rule and the reasons therefor as just stated. Bishop on Marriage and Divorce, §§ 778, 779; Whitfield v. Whitfield, 89 Ga. 471, 15 S. E. Rep. 543; Heermance v. James, 47 Barb. (N. Y.) 120; Fink v. Fink, 137 Cal. 559, 70 Pac. Rep. 628; Evans v. Evans, 93 Ky. 510, 20 S. W. Rep. 605; Sisemore v. Sisemore, 17 Oreg. 542.

It must be admitted, however, that there is quite a respectable array of authority in support of the views of the court in the principal case. Fritz v. Fritz, 138 Ill. 436, 32 Am. St. Rep.; Stewart v. Stewart, 78 Me. 548; Throckmorton v. Throckmorton, 86 Va. 768; Southwick v. Southwick, 97 Mass. 327; Segelbaum v. Segelbaum, 39 Minn. 258, 39 N. W. Rep. 492. The earliest case, and to some extent the leading case in that it is cited and its argument offered as the sole reason for many of the decisions just cited, is the Southwick case, *supra*. In this case Chief Justice Bigelow said: "The word desertion in the statute does not signify merely a refusal of matrimonial intercourse, which would be a breach or violation of a single conjugal or marital duty or obligation only, but it imports a cessation of cohabitation,—a refusal to live together,—which involves an abnegation of all the duties and obligations resulting from the marriage contract." It would seem however, that the later case of Magrath v. Magrath, 103 Mass. 577, virtually nullifies the rule thus laid down. In the Magrath case it is held that where a husband, intentionally and against his wife's consent, for five consecutive years abandoned all matrimonial intercourse and companionship with her she will be entitled to a divorce, notwithstanding that during all this period he has regularly contributed money and all other necessaries for her support and her children. The opening of the court's opinion in this case, imposes at once a very important limitation on the remarks of Justice Bigelow in the Southwick case. The court said: "In this case there has been for the time required by the statute, an abnegation on the part of the husband of the *chief* duties and obligations which result from the marriage contract and distinguish it from others. There is no more important right of the wife, than that which secures to her in the marriage relation the companionship of her husband and the protection of his home. His willful denial of this right, with the intentional and permanent abandonment of all matrimonial intercourse, against her consent, is desertion within the meaning of the statute."

Thus, all these cases which have been so blindly following the Southwick case and rolling flippantly over and over again the pet phrase that desertion is an abnegation of *all* the duties of the marriage relation and not of one or two of them are to some extent limited by this later case in Massachusetts. If, as is said in the Magrath case, desertion is an abnegation of the *chief* duties of the marital relation and not necessarily of all of such duties the question follows, what are the chief duties. If marital intercourse, conjugal companionship and the husband's protection of the wife in his own home are superior to the support of his wife and children in another home provided for them, may it not be that some one even these *chief* duties mentioned in the Magrath case may be *chiefest?* If it is not necessary for the husband or wife to abandon all the duties of the marriage relation in order to constitute desertion, how many of the *chief* duties must they abandon before desertion may be implied? Suppose either party abandons what is admitted to be the highest duty impose by the marriage relation, to-wit, conjugal intercourse, indeed the one duty that gives the relation any practical cause for existing at all, "the central element of marriage to which the rest is but ancillary," may it not be properly contended that the abandonment of this the highest and most essential requirement of the marriage relation is a practical abandonment of the entire relation and thus essentially a desertion?

JETSAM AND FLOTSAM.

IMPOSITION OF NON-JUDICIAL FUNCTIONS ON JUDGES.

In Matter of Davies, 168 N. Y. 89, 102, occurs the following language:

"While the performance of administrative duties cannot be imposed by the legislature upon the supreme court, as such, except as to matters incidental to the exercise of judicial powers, yet for many years, and without serious question, acts have been passed conferring upon the justices of the court authority, out of term, to perform a variety of functions, administrative or semi-administrative in character, such as the approval of certificates of incorporation, the acknowledgment of conveyances, the solemnization of marriages, the appointment of commissioners of jurors, the investigation of the financial affairs of villages and the like. 2 R. S. 756, sec. 4; Laws 1847, ch. 319, sec. 1; Laws 1892, ch. 682, sec. 64; Laws 1892, ch. 685; Laws 1897, ch. 194; Laws 1897, ch. 430. A distinction seems to prevail in practice between powers conferred upon a court and those conferred upon the judges thereof."

When the extraordinary functions imposed relate to the machinery of the administration of justice, such as the appointment of clerks of courts, referees, commissioners of condemnation, or even commissioners of jurors, the powers may well be treated as incidentally, if not directly, judicial, and therefore legitimate. Where powers or duties conferred do not—such as the solemnization of marriages—infringe upon the essential functions of other departments of the government, the propriety of so utilizing judges may be suffered to pass unquestioned. When, however, duties or functions that naturally and logically or by immemorial custom attach to the legislative or executive branches are attempted to be transferred to persons holding the office of judge, the disposition should be to administer the constitutional separation of governmental departments and hold judges ineligible. An extension of the distinction between the eligibility of a court and of the judges thereof as individuals tends toward subverting the real purpose of the constitution as well as practical mischief.

This subject has recently been up for elaborate consideration by the Supreme Court of Minnesota, in State

v. Brill, 111 N. W. Rep. 639. It was held that chapters 51 and 54, pp. 189, 192, Sup. Laws, 1883, of Minnesota, in so far as they require the judges of the district court, or a majority of them, to appoint the members of the board of control of the County of Ramsey, are unconstitutional, because they assume to impose upon members of the judicial department powers and functions which are, by the constitution of the state, assigned to another department of the government. It appeared that from time to time judges of the district court had assumed to make appointments of a board of control or directors to manage the affairs of the County of Ramsey, including the maintenance and operation of an almshouse and hospital, and in general the discharge of the duty of overseers of the poor. Recently, however, the judges refused to fill a vacancy in the board, assigning as a reason the unconstitutionality of the statutes. The district attorney prayed for a *mandamus* and the supreme court now sustains the declination of the district court judges to act on the ground that the duties imposed are essentially executive, taking care, however, to hold that the directors heretofore appointed were *de facto* officers, and that their acts as such were valid. After extended historical discussion the Supreme Court of Minnesota adds the following practical suggestions, which are of great weight:

"The members of the board of control, which this statute requires the judges to appoint, have no connection with the judiciary. They are charged with the administration of important affairs which are remote from the duties of the courts, and they are under the complete control of the other departments of the government. If the district judges can be required to appoint the members of this board, there is no reason why they may not be required to appoint the mayor, the members of the board of public works, the county commissioners, the chief of police, and all other city and county officers. The supreme court may as well be required to appoint the state board of control, the bank examiner, the regents of the State University, and the members of all other numerous state boards and commissions. If the legisalature may require the courts to make these appointments, there seems to be no reason why it cannot also require them to surpervise their appointees, remove them, investigate their actions, report concerning their administration, and even administer the departments themselves. Such a doctrine would render nugatory the constitutional prohibition and entirely revolutionize the system of government.

The suggestion that the judges of the district court may be compelled to act as individuals, instead of as judges, is not pertinent to this case. The statutes purport to impose the duty upon 'the judges of the district court of the second judicial district, County of Ramsey, state of Minnesota, or a majority thereof.' It requires them to act as judicial officers. Its mandate is directed to the judges of the districtcourt, and not to the individuals who for the time occupy the official positions. It does not assume to impose a duty upon individuals. The petition prayed for a writ directed to the parties named as 'judges of the district court,' etc., and the order to show cause is so directed. The power of the legislature to impose a duty of this character upon an individual and compel its performance is not involved in this case. * * * The disposition to impose such non-judicial functions upon the judges is manifestly due to the public confidence in their fairness and disinterestedness, and to the belief that they will not be influenced by selfish, unworthy or partisan motives. It is possible that for a time the public would be benefitted by the performance of such functions by the court, but the inevitable result in the end would be to lessen its efficiency and prestige as the guardian and conservator of the constitution and laws and the rights of individuals under the law."—*N. Y. Law Journal.*

BOOK REVIEWS.

AMERICAN STATE REPORTS, VOL. 113.

It is probable that this old and well established series of reports never issued a more valuable volume than the one we have for review, especially as to the great exhaustiveness and ability with which its monographic notes are prepared. Of the many valuable notes we desire to especially refer to the following, to-wit: "Probate of Foreign Wills;" "What Constitutes the Crime of Living in Open and Notorious Adultery;" "Sham Pleadings;" "The Rule of Pari Delicto;" "Proof and Evidence of Foreign Laws and Their Effect;" and "Presumption of Negligence from the Happening of an Accident Causing Personal Injury."

Printed in one volume of 1171 pages and published by the Bancroft-Whitney Co., San Francisco, Cal.

CLARK ON CORPORATIONS, 2D EDITION.

The second edition of that truly great handbook on the law of Private Corporations by William L. Clark, has issued from the press. Not being a new book it is not necessary for us to say much about the author or this first edition of this work. Both are well-known to the profession and to say that both are quite favorably known is no exaggeration. This work on corporations is one of the best, if not the best, one volume work on this subject that has been published in recent years. It is one of the first as well as one of the greatest of the celebrated "Hornbook Series" of which it is a part. While we most highly and most urgently recommend this work as the best text-book on the law of private corporations that is now in print, and therefore the most desirable work for law schools and law students, we nevertheless are fully of the opinion that it will be found also very desirable for the practitioner, especially in giving him a line to the principle controlling the question he has at hand from which he can afterwards work out through the digests, local and general.

Printed in one volume of 721 pages and published by the West Publishing Co., St. Paul, Minn.

ENCYCLOPEDIA OF EVIDENCE, VOL. 10.

The great encyclopedic undertaking known as the Encyclopedia of Evidence is rapidly nearing completion. Volume 10 has just issued from the press and more than justifies the claims of the publishers as well as maintaining the high standard hitherto established by preceding volumes of this series. Two subjects of great evidentiary importance are discussed in the present volume, to-wit: "Privileged Communications" in 283 pages, by Willoughby Rodman, and 'Records" in 354 pages by the editorial staff of the L. D. Powell Company. What communications are privileged and how far a record evidence is admissible, and in what manner such records are to be proven, are some of the most frequent and troublesome ques-

tions which arise on the trial of a cause. Our examination of the discussion of these two important topics of law has disclosed a most intimate knowledge on the part of the authors with the principles governing and underlying both of these general subjects of law and an ability on their part to analyze the subject into very convenient, logical, minute and accessible subdivisions whereby every conceivable question can be found separately discussed with all the authorities in point carefully collated under proper annotations. Altogether the volume is worth the price of many text-books.

Printed in one volume of 1044 pages and published by the L. D. Powell Company, Los Angeles, Cal.

ESS' POWER OF SPECIAL TAXATION.

The power of local municipal jurisdictions to condemn private property for street and alley purposes and then assess back arbitrarily as benefits the full cost of such condemnation, or the power to grade or improve a highway and then assess the cost of such grading or improvement as benefits, notwithstanding such grading or improvements may have actually injured some abutting land owner, is a question of American jurisprudence that just wont be put down, federal and state courts to the contrary notwithstanding. Such constant eruptions from what courts have been pleased to call an extinct crater create the suspicion that the courts have misjudged the power of justice slumbering within and will sooner or later be forced to recognize it. This is the evident attitude of Henry N. Ess in the preparation of his Treatise on the Power of Special Taxation in which he offers the profession a critical analysis of special taxes for local and public improvements, considered with reference to the provisions of federal and state constitutions.

That this analysis of the present state of the law is indeed a *critical* one is fully proven by the author's piercing thrusts with which he opens his preface and from which we quote a few passages. The author says: "There are few persons in the United States, who understand and fully appreciate the fact that the power of local taxation of real estate in our cities, towns and villages is absolutely without limit, unless that limit be the whole value of the land taxed and the full value of all houses and other improvements thereon." That is the opening shot and it would seem to "shiver the timbers" of many a judicial decision upholding unlimited local powers of special taxation. Further on in the preface, however, the atmospheric conditions become surcharged with sulphurous denunciation against a system of special taxation born in iniquity, among which we pick out this good shot: "The unlimited power of the English parliament should not have been given to our city councils. But city governments in the United States have and exercise even greater power. No parliament in England from Runnymede to the present hour has ever yet undertaken to make an actual damage a real benefit." Having riddled the arguments and position of the courts on this question, the author next holds them up to ridicule as seeking to change principles of justice decreed by divine authority: "Our city councils should not be compelled by the courts to serve two masters having opposing interests, one master being the abutting property-owner and the other, the balance of the public. No man can serve two masters. This principle is deeply imbedded in human experience; it was the divine judgment of Jesus Christ, and it is a source of deepest regret that our American courts should dare to reverse this judgment." The author then grows impertinent, and, after laying down the proposition that every state constitution provides that private property shall not be taken or damaged without just compensation, propounds this embarrassing question to the American judiciary who have been so blindly following the supreme blunder of the Federal Supreme Court in French v. Barber Asphalt Paving Co., and subsequent decisions which practically overruled Norwood v. Baker: "May a state legislature authorize cities, towns and villages to do a thing the state constitution prohibits them from doing and then to tax the injured person for the privilege of doing him the injury?" Failing to obtain a satisfactory answer to this question the author changes base and discusses the sacredness of tax-bills for public improvements: "The public work contracted to be done may be ruinous to the property taxed and to the property-owner, yet the tax-bills issued for doing this injury are sacred constitutional obligations and valid to all intents and purposes in the hands of the original wrongdoer."

It is very easily observed from these quotations which side of the question the author takes in this discussion, and from the uncompromising tone of these excerpts it may be fairly drawn that the author does not assume to act judicially. He approaches his subject as a special pleader and aims to show the error in a long line of judicial decisions. The editorial position of the CENTRAL LAW JOURNAL has ever since that splendid decision of the Supreme Court of the United States in the case of Norwood v. Baker been in sympathy with the views of the author of this work, as well as the views expressed by the majority of the court in the case just cited. 51 Cent. L. J. 243, 423, 460; 52 Cent. L. J. 91, 247, 429; 53 Cent. L. J. 261, 281; 54 Cent. L. J. 81.

The truth of the whole business is that the reason for the rule upheld by the majority of state and federal courts on this question is one not founded in principle but in expediency. The fact is, every judge has been convinced that it was constitutionally wrong to arbitrarily assess the cost of any public improvement upon a single private property owner against his consent and without regard to the question whether his particular property has been in fact damaged or benefited by the improvement, but they have been led to take the position they have because of what they conceived to be the "necessity of the situation," to-wit, that no city could improve its streets within a hundred years if every abutting property owner could litigate the question whether the particular improvement benefited his property to the extent of the amount assessed against him. Between these two horns of the dilemma the courts have taken that view which seemed to be more "expedient" from a public welfare standpoint, rather than the view which founded on principle protects the individual property owner against unjust imposition at the expense, even, of prompt and cheap public improvements. We do not hesitate to say that when the individual is sacrificed for the benefit of the majority without just compensation made him you have sown the seeds of rebellion and anarchy in the breasts of those who have been outraged by legalized injustice. It were far better that any city should remain unimproved except as God himself should carpet the landscape with the richness of that inimitable green velvet which nature scatters with such a profligate hand than that a single individual should be unjustly burdened for the sake of the many and come to regard our cherished consti-

tutional safeguards as being capable of being shifted as expediency or the will of a thoughtless majority may dictate.

Anyone holding these views or seeking light on this still *unsettled* question will be charmed with Mr. Ess' discussion of it.

Printed in one volume of 389 pages, bound in buckram and published by the Pipes-Reed Book Co., Kansas City, Mo.

HUMOR OF THE LAW.

"We have secured you a new trial," said the lawyer, visiting his client in jail.

"No, thank you," answered the prisoner. "The first jury gave me about half I deserved, and there might be an intelligent jury next time."

The following description in a deed on record in a certain county of North Carolina is copied unchanged from the Book of Deeds, with the exception, only, of the name of the unfortunate landowner: "Begging at Beck's South corner running thence North 50 feet; thence West 50 feet; thence South 50 feet; thence East 50 feet to beginning, this being a plot of land 50 feet square cut from the back end of the said Jemima Jones."

Though this was paid immediately, it is scarcely likely to serve as a model for less modest present-day claimants.

A claim for damages against a railroad company is so often a license for exorbitant charges that a simple bill, such as was received by an American railroad company many years ago, even apart from its humorous aspect, is refreshing. It ran as follows:

The ——— and ——— Railroad Company,

To John Smith, Dr.

July 19, 1837 — To running your Locomotive into my wife; as per Doctor's bill for curing her	$ 10.00
To smashing ban box and spilling her hat	3.87
To upsetting my deer born (wagon) and breaking it	35.00
To hurting *me*	5.00
	$ 53.87

There is authority for stating that the claim was paid immediately.—*Scrap Book.*

WEEKLY DIGEST.

Weekly Digest of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. ACCORD AND SATISFACTION—Sufficiency.—A payment by a debtor of a sum less than is due under his contract to the creditor held not a satisfaction of the debt.—Schlessinger v. Schlessinger, Colo., 88 Pac. Rep. 970.

2. ACCOUNT, ACTION ON—Petition.—Where a petition alleges that defendant owed plaintiff a certain sum for merchandise sold on credit in the amounts and at the dates set forth, a cause of action on the account is sufficiently stated.—FOX & Jewell v. Barksdale & Sledd, La., 42 So. Rep. 957.

3. ACKNOWLEDGMENT—Authority to Take.—A notary in the employ of the grantee, but having no interest in the property or the conveyance, is not disqualified to take the acknowledgment of the grantors.—Smith v. Ayden Lumber Co., N. Car., 56 S. E. Rep. 555.

4. ACTION—Joinder of Causes.—A declaration in which a count in contract against one defendant is joined with counts in tort against other defendants is bad on demurrer.—Gallagher v. Sisters of the Poor of St. Francis of Jersey City, N. J., 65 Atl. Rep. 883.

5. ACTION—Parties.—Where defendant in a suit to quiet title files a separate suit, asking the same relief, and the two suits are consolidated, the parties are in no different position than if plaintiff in such separate suit had filed a cross-petition in the original suit.—Schallenberg v. Kroeger, Neb., 110 N. W. Rep. 664.

6. ADVERSE POSSESSION—Color of Title.—Where C was in possession of real estate and conveyed it by quitclaim to L who took possession under claim and color of title, and held possession under such claim, and made improvements and paid taxes for more than five years, he secured title by adverse possession.—Little v. Crawford, Idaho, 88 Pac. Rep. 974.

7. ADVERSE POSSESSION—Computation of Period.—Under the statute relating to survival of actions, time of adverse possession relied on as defense in trespass to try title held measureable back from the commencement of the action, even as to heirs of deceased plaintiff.—Upson v. Campbell, Tex., 99 S. W. Rep. 1129.

8. ADVERSE POSSESSION—Color of Title.—In order to constitute a deed color of title, the party to whom it was made must have taken possession of some part of the land conveyed thereby claiming title to the whole.—Henry v. Frohlichstein, Ala., 43 So. Rep. 126.

9. APPEAL AND ERROR — Election Contests.—Where appellant caused the ballots to be certified to the court of appeals, on an appeal in an election contest he could not thereafter object that the ballots should not have been examined.—Combs v. Combs, Ky , 99 S. W. Rep. 1150.

10. APPEAL AND ERROR—Harmless Error.—If a question to a witness is improperly overruled, yet if the witness during his testimony fully answers the question, no reversible error is comitted.—Gracy v. Atlantic Coast Line R. Co., Fla., 43 So. Rep. 903.

11. APPEAL AND ERROR—Remand to Lower Court.—The supreme court will not decide what was expressly pretermitted in the decision of the chancery court, and will reverse the case and remand it for adjudication.—Peirce v. Halsell, Miss., 43 So. Rep. 98.

12. APPEAL AND ERROR—Right to Review.—If a plaintiff is denied the opportunity to prove his cause of action on a sufficient pleading, he is entitled to have an adverse judgment reviewed in the supreme court.—Walters v. Village of Exeter, Neb., 110 N. W. Rep. 631.

13. APPEAL AND ERROR—Trial Court's Discretion.—In the absence of a showing to the contrary, it will be presumed on appeal that the trial court properly exercised its discretion in denying a motion for default for failure to answer.—Bardon v. Hughes, Wash., 88 Pac. Rep. 1040.

14. APPEAL AND ERROR—Voluntary Nonsuit.—Where the court on the trial intimates an opinion that plaintiff cannot maintain his action, he may take a judgment of nonsuit and appeal.—Morton v. Blades Lumber Co., N. Car., 56 S. E. Rep. 551.

15. ASSAULT AND BATTERY—Aggravated Assault.—Whoever assaults another with a deadly weapon, not having a premeditated design to effect death, and not having any intent to take life, is guilty of aggravated assault.—Lindsey v. State, Fla., 43 So. Rep. 87.

16. ATTACHMENT—Proceedings to Procure.—In an attachment against a nonresident where complainant fails to show that the party upon whom the writ was served had in its possession at the time any property subject to the attachment, the court obtained no jurisdiction to entertain the suit.—Louis Werner Sawmill Co. v. Sheffield, Miss., 42 So. Rep. 876.

17. ATTORNEY AND CLIENT—Compensation.—Where an attorney agrees to conduct certain legal business for a sum named, he is estopped to deny that such sum was a reasonable compensation.—*In re* Rapp's Estate, Neb , 110 N. W. Rep. 661.

18. ATTACHMENT—Damages for Wrongful Attachment.—In a common-law action for wrongful attachment, plaintiff can only recover his statutory costs, and is not entitled to recover for attorney's fees in the action.—McGill v. W. P. Fuller & Co., Wash., 88 Pac. Rep. 1038.

19. ATTORNEY AND CLIENT—Acting for Adverse Parties.—The moving to dismiss a case by defendant's attorney, under authorization from plaintiff, is not such a representation of both parties by him, as is forbidden.—*Ex parte* Randall, Ala., 42 So. Rep. 870.

20. BAIL—Scire Facias on Bond.—Though a *scire facias* case was reversed and dismissed because of the insufficiency of a bail bond, the principal and surety were liable for costs in the court of criminal appeals; such case being governed by the rules regulating costs in civil cases.—Stephens v. State, Tex., 99 S. W. Rep. 1122.

21. BAILMENT—Banks and Banking.—Where money is deposited in the name of C as "Atty ," as between C and the bank the latter is liable to pay the money so deposited to C on his checks —Cunningham v. Bank of Nampa, Idaho, 88 Pac. Rep. 975.

22. BANKRUPTCY—Injunction in State Court.—Where, under a decree in a bankruptcy proceeding in the United States court, land is sold, state court held without jurisdiction to enjoin the execution of a deed therefor.—Henderson v. Henrie, W. Va., 56 S. E. Rep. 869.

23. BANKS AND BANKING—Note of Third Person.—A bank which took a note and mortgage as security held not to have been affected with notice of any rights on the part of another.—First Nat. Bank v. Gunhus, Iowa, 110 N. W. Rep. 611.

24. BENEFIT SOCIETIES — Expulsion of Member.—A fraternal order held, under its constitution and by-laws, to have power to try a member on a charge of conduct unbecoming a member, and expel him if found guilty.—Moon v. Flack, N. H., 65 Atl. Rep. 829.

25. BILLS AND NOTES—Accommodation Paper.—Where a note of a manufacturing corporation appears to have been accommodation paper only, the burden is on the indorsee to establish, not only payment of value before maturity, but the *bona fides* of the transaction.—National Bank of Newport v. H. P. Snyder Mfg. Co., 102 N. Y. Supp. 478.

26. BILLS AND NOTES—Action by Indorsee.—The transferee of a negotiable note, who has purchased the same in the usual course for value, may bring an action at law against the maker without proof of indorsement.—First Nat. Bank v. Sprout, Neb., 110 N. W. Rep. 713.

27. BILLS AND NOTES—Waiver of Presentment.—In an action by the payee against the indorser before the delivery of notes, where defendant testified that he did not expect presentment for payment to be made at maturity, the waiver of presentment is shown.—Baumeister v. Kuntz, Fla., 42 So. Rep. 886.

28. BROKERS—Commissions.—A broker employed to sell real estate is not entitled to a commission unless he procures a purchaser ready, able, and willing to take the same on the terms given to the broker by the owner.—Wagner v. Norris, Colo., 88 Pac. Rep. 973.

29. BROKERS—Contract of Employment.—Where one party undertakes for a certain compensation to obtain options on certain property for another party, it is not necessary that there should be an actual purchase of the properties under the options before the compensation is earned.—Worthington v. McGarry, Ala., 42 So. Rep. 988.

30. BROKERS — Set-off and Counterclaim.—Where a real estate broker defrauded his principal, held, in an action for recovery, that the broker could not recoup expenses incurred by him, nor the amount paid his associate in the fraud.—Van Raalte v. Epstein, Mo., 99 S. W. Rep. 1077.

31. BUILDING AND LOAN ASSOCIATIONS—Liability of Borrower on Insolvency.—Statement of liability of a member of a building and loan association on its insolvency, it having deposited his bond and mortgage and that of others, for the exclusive benefit of its members in a certain state.—Clarke v. Darr, Ind., 80 N. E. Rep. 19.

32. CANCELLATION OF INSTRUMENTS—Failure of Consideration.—Where plaintiff sued his son and his son's wife to set aside certain conveyances, on the ground that defendants had failed to support plaintiff as agreed, evidence held to authorize judgment setting aside the conveyance, subject to a lien for money advanced by the defendants.—Tomsik v. Tomsik, Neb., 110 N. W. Rep. 674.

33. CANCELLATION OF INSTRUMENTS—Laches —Where a forced heir sold his interest in the succession, an action brought eight years after his death to set aside the act was barred by laches.—Gougenheim's Heirs v. Ermann, La., 43 So. Rep. 170.

34. CARRIERS—Condition of Premises.—Railway company held liable for injuries from defects of which it had actual knowledge, or which had existed so long that notice might be reasonably inferred.—Atchison, T. & S. F. Ry. Co. v. Allen, Kan., 88 Pac. Rep. 966.

35. CARRIERS—Conversion. — A carrier's unqualified refusal to deliver goods to consignee held evidence of conversion.—Louisville & N. R. Co. v. Britton, Ala., 43 So. Rep. 108.

36. CARRIERS—Delay in Delivering Live Stock.—In an action for unreasonable delay in the shipment of live stock, where there was no allegation or proof of contributory negligence, refusal to submit those questions

was proper.—Nelson v. Chicago, B. & Q. Ry. Co., Neb., 110 N. W. Rep. 741.

37. CARRIERS—Limitation of Liability.—A condition in a contract for the shipment of live stock, that, unless claims for damages are presented within 10 days from the unloading of live stock, claim shall be deemed waived, is in violation of Const., art. 11, § 4.—Cook v. Chicago, R. I. & P. Ry. Co., Neb., 110 N. W. Rep. 718.

38. CARRIERS—Liability as Warehouseman.—Where a reasonable time has elapsed after notice to a consignee of the arrival of freight, a carrier becomes a warehouseman, liable for ordinary negligence.—Brunson & Boatwright v. Atlantic Coast Line R. Co., S. Car., 56 S. E. Rep. 538.

39. CERTIORARI—Remedies of Taxpayers.—*Certiorari* will issue at the suit of a taxpayer and abutting landowner to review the award by the city of a contract for street paving to a bidder whose bid failed to conform with the specification under which the bids were offered.—Barber Asphalt Paving Co. v. Inhabitants of City of Trenton, N. J., 65 Atl. Rep. 873.

40. CONSTITUTIONAL LAW—Colored Men as Jurors.—Equal protection of the laws held not denied to a colored person by a law which makes no discrimination against the colored race, but which grants the discretion to certain officers, which can be used to the abridgement of the rights of colored persons to serve on petit juries.—Montgomery v. State, Fla., 42 So. Rep. 894.

41. CONSTITUTIONAL LAW—Condemnation Proceedings.—Sp. Laws 1889, p. 127, ch. 14, sec. 32, providing for the condemnation of land by the city of Paris, held unconstitutional as a deprivation of property without due process of law.—Tucker v. City of Paris, Tex., 99 S. W. Rep. 1127.

42. CONSTITUTIONAL LAW—Judicial Powers.—The division of powers between the several branches of the state government made by Const., art. 2, is final, and the legislature cannot change the character of questions with which the courts are entitled to deal.—Tyson v. Washington County, Neb., 110 N. W. Rep. 634.

43. CONSTITUTIONAL LAW—Mechanic's Lien.—Code Civ. Proc., § 1195, in relation to attorney's fees in mechanic's lien cases, held violative of the state constitution, declaring the unalienable rights of possessing and protecting property.—Builders' Supply Depot v. O'Connor, Cal., 88 Pac. Rep. 982.

44. CONTEMPT—What Constitutes.—Where, after determination of a *habeas corpus* proceeding, one of the parties thereto brings a similar action in another court, a disclaimer of any design to embarrass the due administration of justice is no defense to a proceeding for contempt.—Terry v. State, Neb., 110 N. W. Rep. 733.

45. CONTRACTS—Hireling Contracts on Share of Crop.—Where cotton was divided between owner and hireling according to terms of crop contract and hireling's share was delivered to plaintiffs, plaintiffs held entitled to maintain trover for taking of the cotton by a third person.—Farrow v. Wooley & Jordan, Ala., 43 So. Rep. 144.

46. CONTRACTS—Joint Purchase at Auction.—Contracts for the purpose of suppressing and chilling competitive bidding upon property offered for sale at public auction held fraudulent and void.—Henderson v. Henrie, W. Va., 56 S. E. Rep. 369.

47. CONTRACTS—Ratification.—Where a party who claimed he had been fraudulently induced to enter into a contract afterwards employs counsel, and after full investigation ratifies the contract and accepts benefits, he is bound by such ratification.—Kertson v. Kertson, Neb., 110 N. W. Rep. 750.

48. CONTRACTS—Restraint of Trade.—The sale of a turpentine business was sufficient consideration to sustain a covenant that the seller would not engage in that business within 10 miles of a town so long as the buyer remained there.—Harris v. Theus, Ala., 43 So. Rep. 131.

49. CONTRACTS—What Law Governs.—Where a contract to be performed in Louisiana is sued on in Alabama, and there is no proof of the laws of Louisiana, held, that the court will be governed by the statutes of the former state.—Allen v. Caldwell, Ward & Co., Ala., 42 So. Rep. 855.

50. CORPORATIONS—Powers and Liabilities.—The rule that a corporation has no power to enter into a contract of partnership held not to prevent the law from imposing on a corporation the liability of a partner.—Breinig v. Sparrow, Ind., 80 N. E. Rep. 37.

51. COUNTIES—Right of Taxpayers.—Property holders and taxable inhabitants charging gross abuse of power and fraud have a standing to restrain the alleged illegal expenditure by a police jury of the funds of the parish.—Murphy v. Police Jury, St. Mary Parish, La., 42 So. Rep. 979.

52. CRIMINAL EVIDENCE—Opinion Evidence.—A non-expert witness can be examined on a trial for murder as to the cause of death, where the cause was evident to an ordinary person.—State v. Caron, La., 42 So. Rep. 960.

53. CRIMINAL EVIDENCE—Trailing by Bloodhounds.—The trailing by a bloodhound of tracks testified to on the part of the state as being defendant's, to defendant, though not substantive evidence justifying conviction, is evidence in corroboration of the testimony as to the identity of the tracks.—State v. Hunter, N. Car., 56 S. E. Rep. 547.

54. CRIMINAL LAW—Conviction of Offense Not Included in Indictment.—Conviction of offense not necessarily included within offense set forth in indictment or information held improper.—Lindsey v. State, Fla., 43 So. Rep. 87.

55. CRIMINAL LAW—Discontinuance of Case.—Omission by a ministerial officer to do something it was his duty to do, or the passing of a term without entering an order discontinuing a case on the docket, will not work a discontinuance of the case.—Smith v. State, Ala., 43 So. Rep. 129.

56. CRIMINAL LAW—Expert Evidence.—Where physicians were introduced as experts the attack of counsel on their testimony should have been directed to its weight, credibility, and probative effect, rather than its competency.—McConnell v. State, Neb., 110 N. W. Rep. 666.

57. CRIMINAL LAW—Instructions.—The judge can decline to bring out particular facts in his instructions, having sufficiently stated the law regarding them in the general charge.—State v. Rideau, La., 42 So. Rep. 973.

58. CRIMINAL TRIAL—Burden of Proof.—Burden of proving negative averments of affidavit charging defendant with riding on freight car with intention of being transported free held not on the state.—Gains v. State, Ala., 43 So. Rep. 137.

59. CRIMINAL TRIAL—Harmless Error.—One of the witnesses for the prosecution refusing to repeat an important statement because he had repeated it several times, there was no impropriety in the district attorney telling him before the jury that it was before the judge he had made such statement.—State v. Jones, La., 42 So. Rep. 967.

60. CRIMINAL TRIAL—Inviting Error.—Where, in a trial for cattle stealing, defendant elicits incompetent testimony as to the identity of handwriting, he cannot complain if the state interrogates a witness along the same lines.—State v. Grubb, Mo., 99 S. W. Rep. 1088.

61. CRIMINAL TRIAL—Plea in Abatement.—Where a so-called plea in abatement does not state facts sufficient to constitute such a plea and contains no negation of any element of the offense charged, a demurrer thereto is properly sustained.—Steiner v. State, Neb., 110 N. W. Rep. 723.

62. CRIMINAL TRIAL—Privilege of Witnesses.—A defendant in a criminal case held not entitled to review on appeal the rulings of the court requiring a witness to testify notwithstanding his claim of privilege.—Beauvoir Club v. State, Ala., 42 So. Rep. 1040.

63. CRIMINAL TRIAL—Remarks of Prosecuting Attorney.—Statements of the prosecuting attorney, having no

predicate in the facts and calculated to arouse prejudice, in a murder case, where the evidence was of a doubtful nature, held ground for reversal.—Sykes v. State, Miss., 42 So. Rep. 875.

64. DAMAGES—Limitation of Liability.—Damages to property injured in transit are estimated upon the net value of the property at the place of delivery, notwithstanding a stipulation in the bill of lading that the measure of damages should be the value at the point of shipment.—McConnell Bros. v. Southern Ry. Co., N. Car., 56 S. E. Rep. 559.

65. DEATH—Jurisdiction in Action for Wrongful Death.—A recovery for the negligent death in the state of a nonresident having no property in the state at the time of his death may be had by his administrator.—Alabama Steel & Wire Co. v. Griffin, Ala., 42 So. Rep. 1034.

66. DEEDS—Consideration.—Where in a suit to cancel a sale of an interest of defendant's ancestor as a forced heir it appeared that the parties to the act died before the suit brought, after many years, there was an absolute presumption of adequate consideration.—Gougenheim's Heirs v. Ermann, La., 42 So. Rep. 170.

67. DEPOSITIONS—Voluntary Testimony.—Where a witness examined by deposition attached certain letters as requested, a voluntary explanation thereof not in response to any interrogatory should have been excluded.—Central Texas Grocery Co. v. Globe Tobacco Co., Tex., 99 S. W. Rep. 1144.

68. DIVORCE—Refusal to Have Sexual Intercourse.—The refusal of a wife to have sexual intercourse with her husband cannot be regarded as a desertion of him where they continue to live in the same house.—Pfannebecker v. Pfannebecker, Iowa, 110 N. W. Rep. 618.

69. ELECTRICITY—Contributory Negligence. — Where deceased knew of and deliberately placed himself in position to receive an electric current, there can be no recovery.—Citizens' Telephone Co. v. Westcott's Adm'x, Ky., 99 S. W. Rep. 1153.

70. ELECTRICITY—Uninsulated Wires.—Electric light company held liable for injuries to a boy climbing in tree, caused by the company negligently permitting a wire passing through the tree to remain uninsulated.—Temple v. McComb City Electric Light & Power Co., Miss., 42 So. Rep. 871.

71. EMINENT DOMAIN—Damages.—Where property of a landowner is damaged by the use of a street railroad, the damages recoverable include all damages which cause a diminishing in the value of the property.—Stehr v. Macon City & Ft. D. Ry. Co., Neb., 110 N. W. Rep. 701.

72. EMINENT DOMAIN—Location of Railroad on Highway.—The location on a public highway of a railroad, unless it materially interrupts abutting owner's means of access or imposes some additional burden on his soil, held not a cause of action.—Scrutchfield v. Choctaw, O. & W. R. Co., Okla., 88 Pac. Rep. 1048.

73. EMINENT DOMAIN—Powers of Municipality.—The right of eminent domain only exists in a municipality when the power has been conferred by the legislature.—Stowe v. Town of Newborn, Ga., 56 S. E. Rep. 516.

74. EQUITY—Capacity to Sue.—Incapacity of a voluntary association to maintain a bill for injunction held only available on demurrer or motion to dissolve the injunction, and to have been cured by amendment.—Flannery v. People, Ill., 80 N. E. Rep. 60.

75. EVIDENCE—Parol Evidence.—Where certain notes recited that they were given in part payment for a hearse, etc., parol evidence was admissible as against a purchaser after maturity to show the real consideration.—Kampmann v. McCormick, Tex., 99 S. W. Rep. 1147.

76. EVIDENCE—Parol Evidence.—A receipt not under seal by a creditor purporting to release a debtor of all claims against him under a contract may be explained by parol evidence.—Schlessinger v. Schlessinger, Colo., 88 Pac. Rep. 970.

77. EXCEPTIONS, BILL OF—Time for Signing.—A purported bill of exceptions will be stricken out as being part of the record on appeal, where it was signed in vacation, and there was no order of court nor agreement of counsel extending the time for presenting and signing the bill.—Olderson v. Town of Prattville, Ala., 42 So. Rep. 986.

78. EXECUTORS AND ADMINISTRATORS—Accounting.—A person having in his possession just prior to his qualification as administrator certain property of deceased, and desiring to show that it did not come into his hands as administrator, must clearly establish some disposition of the property before his qualification.—Kirby v. Moore, Ky., 99 S. W. Rep. 1156.

79. EXECUTORS AND ADMINISTRATORS—Mortgages.—An administrator cannot take an assignment of a mortgage on his intestate's land and exercise the power of sale therein to foreclose, to the injury of the heirs.—Morton v. Blades Lumber Co., N. Car., 56 S. E. Rep. 551.

80. EXECUTORS AND ADMINISTRATORS—Time for Filing Claims.—That claimant did not discover fraud on the part of a decedent until after the expiration of the time fixed for filing claims against his vendor's estate does not extend the time for filing his claim.—Gurling v. Allvord's Estate, Neb., 110 N. W. Rep. 683.

81. FIRE INSURANCE—Breach of Condition.—Where a policy provided that it should be void if any change took place in the title of the property insured, a contract of sale of the property was a breach of the condition and avoids the policy.—Manning v. North British & Mercantile Ins. Co., Mo., 99 S. W. Rep. 1095.

82. FIRE INSURANCE — Nonpayment of Assessment Premium.—Where it is sought to avoid a policy of insurance in a mutual fire insurance company for nonpayment of assessment not made for a payment of a loss, it must affirmatively appear that the statute as to assessments has been complied with.—Wolcott v. State Farmers' Mutual Ins. Co., Neb., 110 N. W. Rep. 628.

83. FRAUDS, STATUTE OF—Sale of Lumber.—The statute of frauds, in relation to contracts not to be performed within a year, held not applicable to a certain contract for the sale of lumber.—Byrne Mill Co. v. Robertson, Ala., 42 So. Rep. 1008.

84. FRAUDULENT CONVEYANCES—Burden of Proof.—Where the purported date of a voluntary conveyance from a husband to his wife antedates a creditor's debt, the burden was on the creditor to show that the deed was actually executed subsequent to the incurrence of the debt.—Allen v. Caldwell, Ward & Co., Ala., 42 So. Rep. 855.

85. FRAUDULENT CONVEYANCES—Husband and Wife.—A man may lawfully give his wife his goods in satisfaction of her lawful claim against him, so that the wife may acquire a perfect title thereto unless it is encumbered with a vendor's privilege.—Compton v. Deitlein & Jacobs, La., 42 So. Rep. 964.

86. FRAUDULENT CONVEYANCES—Husband and Wife.—Where a wife took out an accident policy insuring her husband, and the only reference to the wife was in the application, which provided that the policy in case of death should be payable to the wife, and the wife paid the premiums thereon, and the husband assigned all his interest to his wife, and thereafter he was injured, the assignment was not fraudulent as to the creditors of the husband.—Weckerly v. Taylor, Neb., 110 N. W. Rep. 738.

87. GRAND JURY—Quashing Venire.—That an incompetent person has been summoned as a grand juror is no ground for quashing the venire.—State v. Brown, La., 42 So. Rep. 969.

88. GUARANTY—Persons Entitled to Sue.—A party who is only incidentally benefitted by a contract of guaranty has no such interest in its performance as entitles him to sue for its breach.—Punta Gorda Bank v. State Bank of Ft. Meade, Fla., 42 So. Rep. 846.

89. INDICTMENT AND INFORMATION — Sufficiency. — Where a word not in the statute is substituted for the one

that is, and the word substituted is of a more extensive significance, the indictment will be sufficient.—State v. Pellerin, Ala., 42 So. Rep. 159.

90. INFANTS—Guardian Ad Litem.—Where there are infant defendants and the court has appointed a guardian *ad litem*, who appears and answers, the court has jurisdiction, and the infant parties are bound by the decree.—Hansford v. Tate, W. Va., 56 S. E. Rep. 872.

91. INTEREST—Mode of Computation.—Where the interest on a debt always remains in excess of the payments made, the proper method for determining the whole amount due is to calculate the interest, add it to the principal sum, and then deduct from this gross amount the total of the payments made.—Holcombe v. Holcombe, N. J., 65 Atl. Rep. 855.

92. JUDGES—Effect of Absence.—The judges of the civil district court of the parish of Orleans may sit in each other's places in each other's absence, and the judge so sitting may grant an appeal from a judgment rendered by the absent judge.—Bolden v. Barnes, La., 42 So. Rep. 934.

93. JUDGMENT—Foreclosure Decree—Where the amount due from a mortgagor to a mortgagee was settled in foreclosure proceedings, it could not be relitigated in a subsequent suit by the mortgagor's grantee to redeem.—Potter v. Ft. Madison Loan & Trust Bldg. Ass'n, Iowa, 110 N. W. Rep. 616.

94. JUDGMENT—Res Judicata.—A judgment by default in an action for rent held not *res judicata* of the nature of the tenancy, and hence insufficient in a subsequent dispossession proceeding to establish that the tenancy was from month to month.—Rothstein v. Steinbugler, 102 N. Y. Supp. 470.

95. JUDICIAL SALES—Reversal of Judgment.—Where land is sold under a decree to a stranger to the record, and thereafter the decree is reversed, restitution of the premises should be denied on remand of the case when sought in a summary manner by motion, rule, or petition.—Simms v. City of Tampa, Fla., 42 So. Rep. 884.

96. JUDICIAL SALES—Title Acquired.—Where one purchases at a judicial sale while the decree is in full force, a subsequent reversal of the decree will not affect his title, acquired under the sale.—Hansford v. Tate, W. Va., 56 S. E. Rep. 872.

97. JURY—Demurrer to Challenge.—Where defendant offers proof of a properly presented challenge to the array of petit jurors, and the state fails to join issues by demurrer, the allegations must be taken as true, and the state permitted to take issue thereon.—Montgomery v. State, Fla., 42 So. Rep. 894.

98. LANDLORD AND TENANT—Action to Dispossess.—In proceedings under the landlord and tenant act, P. L. 1903, p. 27, § 2, the required affidavit must set forth facts establishing the existence of the relation of landlord and tenant.—Binder v. Azzaro, N. J., 65 Atl. Rep. 849.

99. LANDLORD AND TENANT—Affidavit to Dispossess.—Where affidavit to dispossess tenant merely setting forth that plaintiff is the owner of the premises, and that defendant is in possession as tenant under a former owner, held insufficient to show the relationship.—Binder v. Azzaro, N. J., 65 Atl. Rep. 849.

100. LANDLORD AND TENANT—Enforcement of Restrictions in Lease.—Where a lease providing that no beer save of a particular manufacture shall be sold on the premises is lawful, that the lessor is a member of a combination is no defense to a suit to enforce the restrictive clause.—Jos. Schlitz Brewing Co. v. Nielson, Neb., 110 N. W. Rep. 746.

101. LANDLORD AND TENANT—Holding Over.—Where a tenant for a term of years holds over without any new contract, and the landlord accepts a month's rent after the expiration of the term, he thereby elects to treat the lessee as a tenant from year to year on the terms provided in the lease.—Eppstein v. Kuhn, Ill., 80 N. E. Rep. 80.

102. LIFE ESTATES—Actions by Life Tenant.—A life tenant cannot maintain trover for the conversion of trees, nor trespass *de bonis* for the taking of them, but he may maintain trespass *quare clausum*.—C. W. Zimmerman Mfg. Co. v. Daffin, Ala., 42 So. Rep. 858.

103. LIFE ESTATES—Conveyance by Life Tenant.—A conveyance to one for life with power to sell and convey land, on the express condition that the proceeds shall be invested in other good property to be held under the same conditions, is within Ky. St. 1903, § 4846.—Stevens v. Smith, Ky., 99 S. W. Rep. 1160.

104. LIFE ESTATES—Stock Dividends.—Since stock dividends presumptively represent profits, the burden of proof rests on him who claims that they are captital and represents property of the corporation.—Kalbach v. Clarke, Iowa, 110 N. W. Rep. 599.

105. LIMITATION OF ACTIONS—Tolling the Statutes.—Where a partnership has been dissolved, a partial payment by one of the partners to a creditor, knowing of the dissolution, will not toll the statute of limitations as to the other partner.—Robertson Lumber Co. v. Anderson, Minn., 110 N. W. Rep. 623.

106. LIMITATION OF ACTIONS—Unpaid Legacy.—Where an executor agreed to pay to a legatee her legacy in installments, an express trust was created, and her right to recover the portion of the legacy remaining unpaid was not barred by the statute of limitations.—Glemon v. Harris, Ala., 42 So. Rep. 1003.

107. MANDAMUS—Defenses.—Where relator in *mandamus* refused to produce evidence, the case on motion of respondent should be dismissed; but where respondent assumed the burden and made the evidence, he waives the error, and the case must be determined on the evidence.—Vermillion v. State, Neb., 110 N. W. Rep. 736.

108. MASTER AND SERVANT—Complaint in Action for Injury to Employee.—Where negligence of employer causing injuries to an employee held sufficiently averred where the same is averred in general terms.—Creola Lumber Co. v. Mills, Ala., 42 So. Rep. 1019.

109. MASTER AND SERVANT—Fellow Servants.—Where a servant was injured in operating a railroad in Nevada, whether he was barred from recovery by the fellow-servant rule depended on the law of that state.—Morrison v. San Pedro, L. A. & S. L. R. Co., Utah, 88 Pac. Rep. 998.

110. MASTER AND SERVANP—Injury to Servant.—Ordinarily an employer may rely on the presumption that each employee will exercise due care, not only to avoid injury to himself, but to his co-employee.—Bryant v. Beebe & Runyan Funiture Co., Neb., 110 N. W. Rep. 690.

111. MASTER AND SERVANT—Laborer's Lien.—A bartender whose duties are mainly manual, and who also kept the books, held a laborer within the law creating a lien in favor of laborers on property of employers.—Bluthenthal & Bickart v. Bennefield, Ga., 56 S. E. Rep. 517.

112. MASTER AND SERVANT—Safe Place to Work.—An employee in entering upon his work may assume that the duty of the master to furnish him with a reasonably safe place to work has been performed, unless he is charged with notice that it has not been.—Schillinger Bros. & Co. v. Smith, Ill., 80 N. E. Rep. 65.

113. MASTER AND SERVANT—Torts of Servant.—A master is not responsible for the torts of his servant if directly authorized by him, nor done in the course or within the scope of his employment.—Younkin v. Rocheford, Neb., 110 N. W. Rep. 682.

114. MINES AND MINERALS—Rights of Lessee.—Where the same person holds an oil lease on two adjoining farms, he cannot so conclusively drill an oil well as to drain the oil of one of the farms to the detriment of the other.—Barnard v. Monongahela Natural Gas Co., Pa., 65 Atl. Rep. 801.

115. MINES AND MINERALS—Title Acquired in Sale of Mineral Under Land.—Where there has been a sale of the

mineral lying under the land and a severance of the estate in the mineral from the estate in the surface, the title of the purchaser of the mineral is an estate in fee, which terminates when the mine has been exhausted.—Moore v. Indian Camp Coal Co., Ohio, 80 N. E. Rep. 6.

116. MORTGAGES—Liability of Mortgagee for Taxes.—A person holding a mortgage on realty is under no obligation to pay the taxes on the property, unless under some provision in the mortgage.—Jones v. Black, Okla., 88 Pac. Rep. 1052.

117. MORTGAGES—Sale Under Power.—Failure to tender in court money admitted, by the bill for injunction against sale by trustee under trust deed, held not available on demurrer of "no equity on the face of the bill."—McDonald v. Kamper, Miss., 42 So. Rep. 877.

118. MUNICIPAL CORPORATIONS—Advertisement of Bids for Street Improvements.—That an advertisement for bids for the paving of a street required the use of a patent material does not render the same invalid where all the competition is allowed which the situation permits of.—Dillingham v. City of Spartanburg, S. Car., 56 S. E. Rep. 881.

119. MUNICIPAL CORPORATIONS—Building Restrictions as to Gas Tanks.—An ordinance of a city, providing that it shall be unlawful to erect a gas tank therein without the written consent of the owners of all the property within a radius of 1,000 feet is, as to such provision, void.—State v. Withnell, Neb., 110 N. W. Rep. 680.

120. MUNICIPAL CORPORATIONS—Description of Property in Assessment Roll.—Where a description of property in an assessment roll for public improvements is the same as that by which the owner acquired title, the description is good as against such owner.—Wiemers v. People, Ill., 80 N. E. Rep. 68.

121. MUNICIPAL CORPORATIONS—Injury by Runaway Horse.—Where a runaway horse, hitched to a cart, without lights, on a rainy night, collides with a car coming from the opposite direction, and the motorman is injured, the owner will be held liable.—Damonte v. Patton, La., 43 So. Rep. 153.

122. MUNICIPAL CORPORATIONS—Police Regulations.—Where discretion is validly vested in a municipal board, a court will not interfere with its exercise, but, in the absence of proof to the contrary, will assume the duties are properly performed.—Goytino v. McAleer, Cal., 88 Pac. Rep. 991.

123. MUNICIPAL CORPORATIONS—Rights of Individuals.—An individual held not entitled to enjoin the closing of a street, where there is no allegation that injury is thereby threatened to complainant's property or other rights different in kind from that suffered by the general public.—Robbins v. White, Fla., 42 So. Rep. 841.

124. NEGLIGENCE—Care in Use of Highway.—A traveler injured by being struck by an automobile without negligence on the part of the operator of the automobile, held not entitled to recover.—Simeone v. Lindsay, Del., 65 Atl. Rep. 778.

125. NUISANCE—Injunction.—A person complaining of a public nuisance is not entitled to relief by injunction unless he shows some special injury to himself.—Letherman v. Hauser, Neb., 110 N. W. Rep. 745.

126. NUISANCE—Liability of Landowner.—A landowner who permits another to create a nuisance on the land is liable to the one injured thereby.—Board of Chosen Freeholders of Hudson County v. Woodcliffe Land Imp. Co., N. J., 65 Atl. Rep. 844.

127. PARTIES—Real Party in Interest.—Where a suit is brought in the name of the holder of the legal title to a chose in action, he may be heard on the question of fact, whether the beneficial interest is in the parties bringing the suit.—*Ex parte* Randall, Ala., 42 So. Rep. 870.

128. PARTNERSHIP—What Constitutes.—A parol agreement between two persons to purchase a certain tract of land, together or in partnership, held not to create a partnership between such persons.—Norton v. Brink Neb., 110 N. W. Rep. 669.

129. PARTNERSHIP—Intention of Parties.—The intention controlling in determining the existence of a partnership held the legal intention deducible from the acts of the parties.—Breinig v. Sparrow, Ind., 80 N. E. Rep. 37.

130. PERPETUITIES—Equitable Rights.—Whenever a contract raises an equitable right in property which the obligee can enforce in chancery by a decree for specific performance, such equitable right is subject to the rule against perpetuities.—Starcher Bros. v. Duty, W. Va., 56 S. E. Rep. 524.

131. PRINCIPAL AND SURETY—Accounting.—Where defendant is sued for an accounting for goods under a written contract of agency, he may, under a general denial show the goods in controversy were received under another contract.—Acme Harvester Co. v. Curlee, Neb., 110 N. W. Rep. 660.

132. PRINCIPAL AND SURETY—Condition of Liability.—The owner of property held, under his agreement, not liable to a materialman for lumber furnished a contractor; an order from the contractor not having been presented before the owner paid the contractor.—Bay Shore Lumber Co. v. Donovan, Ala., 42 So. Rep. 1014.

133. PUBLIC LANDS—Fraud in the Procurement.—Where title to land is acquired under the homestead law after a contest before the land department with an adverse claimant, such adverse claimant held not entitled to have the title adjudged a trust on the ground of fraud on the trial of such contest.—Greenameyer v. Coate, Okla., 88 Pac. Rep. 1054.

134. RAILROADS—Abandonment of Tax.—The assignment by a railroad company to private individuals of the right to the avails of a tax voted by a town in aid of the railroad held not an abandonment of the tax.—Arkansas Southern R. Co. v. Wilson, La., 42 So. Rep. 976.

135. RAILROADS—Duty to Fence.—A railroad company is not required to so fence its grounds where the inclosure will exclude the public from shipping and receiving facilities.—Chicago, B. & Q. R. Co. v. Seveek, Neb., 110 N. W. Rep. 639.

136. RAILROADS—Killing Stock.—A railroad company held liable on the ground of negligence where its crew repairing a fence left off a farm crossing gate, and a colt went through the opening, and was killed by a train.—Baltimore & O. S. W. R. Co. v. Zollman, Ind., 80 N. E. Rep. 40.

137. RAILROADS—Negligence.—A railroad company is not as matter of law free from negligence in backing a long freight train at night without signals to warn a quarantine guard on its track at his post of duty.—Louisville & N. R. Co. v. Goulding, Fla., 42 So. Rep. 854.

138. RAILROADS—Obstructing Highway.—Where a railroad track crosses a public highway both a traveler and the railroad have equal rights to cross, but the traveler must yield the right of way to the railroad company in he ordinary course of the latter's business.—Duffy v. Atlantic & N. C. R. Co., N. Car., 56 S. E. Rep. 557.

139. REFORMATION OF INSTRUMENTS—Right to in General.—Ordinarily the reformation of a written instrument will not be granted except as between the original parties or those claiming under them in privity, or those with notice of the facts.—Burner v. Higman & Skinner Co., Iowa, 110 N. W. Rep. 580.

140. SALES—Construction.—In the absence of any agreement to the contrary, the sale of the output of an oil well will be held to mean the total output, and the seller cannot divert a certain proportion of the output for the remuneration of air pressure for bringing up the oil.—Crusel v. Tierce, La., 42 So. Rep. 940.

141. SALES—Destruction of Property Conditionally Sold.—A purchaser of a piano, under a contract by which title was to remain in the seller until payment of the entire price, held liable for unpaid balance thereof, notwithstanding destruction of the piano by fire.—Phillips v. Hollenberg Music Co., Ark., 99 S. W. Rep. 1105.

142. SALES—Notice of Breach.—Where a letter informing a seller of farm machinery of a breach of warranty

reached its destination, and was answered by the seller, it was immaterial that it was not registered as required by the contract.—Peter v. Piano Mfg. Co., S. Dak., 110 N. W. Rep. 788.

143. SALES—Rescission.—Where a written contract of sale of standing hay is made at an agreed price, that it provides that it is to be paid for before taking merely gives a lien on the hay, which may be waived by the seller.—Allen v. Rushforth, Neb., 110 N. W. Rep. 687.

144. SCHOOLS AND SCHOOL DISTRICTS — Expulsion of Scholar.—A school board may adopt any method in obtaining information as to the conduct of a pupil; but in an action to procure reinstatement of a pupil dismissed for misconduct, such misconduct can only be shown by witnesses cognizant of the facts.—Vermillion v. State, Neb., 110 N. W. Rep. 736.

145. SEDUCTION—Evidence of Previous Chaste Character.—Under Penal Code, § 268, requiring on a trial for seduction proof of the prosecutrix's previous chaste character, her reputation may be evidence of such character. —*Ex parte* Vandiver, Cal., 88 Pac. Rep. 993.

146. SEDUCTION—Promise to Marry.—Intercourse some months after promise of marriage held to have been under the promise in prosecution under P. L. 1898, p. 807.—State v. Slattery, N. J., 65 Atl. Rep. 866.

147. SPECIFIC PERFORMANCE—Interpleader.—A vendee held entitled to sue for specific performance and to compel the vendor and a tenant in possession of the property to interplead and adjust the controversy between them. —Eppstein v. Kuhn, Ill., 80 N. E. Rep. 90.

148. STREET RAILROADS—Contributory Negligence.—A bicyclist held guilty of contributory negligence in attempting to cross a street car track in front of a moving car without looking to the rear to discover his danger.—Harbison v. Camden & Suburban Ry. Co., N. J., 65 Atl. Rep. 868.

149. STREET RAILROADS—Presumption of Negligence.—Where a passenger on defendant's street car was injured by the car colliding with another, and there is no evidence explanatory of the collision, the negligence of defendant is presumed.—Birmingham Ry., Light & Power Co. v. Moore, Ala., 42 So. Rep. 1024.

150. SUNDAY—Desecration.—That a person conscientiously believes that the seventh day of the week should be observed as Sunday, and is therefore entitled to work on Sunday under Rev. Laws, ch. 98, § 4, held no defense to a prosecution for keeping open his workshop on the first day of the week.—Commonwealth v. Kirshen, Mass., 80 N. E. Rep. 2.

151. TAXATION—Payment.—Where there are two assessments of the same land to different persons for the same year, a payment of the taxes by one held to prevent the collection of the taxes by the other.—Pickler v. State, Ala., 42 So. Rep. 1018.

152. TAXATION—Tax in Aid of Railroad.—Representations made by the way of electioneering arguments for inducing the voting of a tax by a town in aid of a railroad cannot be invoked for placing on the tax a different interpretation from that expressed in the ballot.—Arkansas Southern R. Co. v. Wilson, La., 42 So. Rep. 976.

153. TELEGRAPHS AND TELEPHONES — Authority of Agents.—An operator at a receiving office had implied authority to contract with the sender of a message to rush it through and deliver it as soon as possible.—Western Union Telegraph Co. v. Cook, Tex., 99 S. W. Rep. 1131.

154. TELEGRAPHS AND TELEPHONES — Limitation of Liability.—The sender of a telegram is bound by a regulation on the back of the message blank, although sent by an agent who cannot read.—Western Union Telegraph Co. v. Prevatt, Ala., 43 So. Rep. 106.

155. TENDER—Sufficiency. — A defendant in partition claiming an interest in the premises as a partner of complainant, in whose name the title stands, need not, to entitle him to his interest, pay into court the amount of his share of the price.—Peirce v. Halsell, Miss., 43 So. Rep. 83.

156. TRADE MARKS AND TRADE NAMES—Infringement. —The jurisdiction of equity to restrain the infringement of a trade mark held founded on the right of property in the complainant and its fraudulent invasion by another, and is exerted to prevent fraud on him and on the public.—J. W. Epperson & Co. v. Bluthenthal, Ala., 42 So. Rep. 963.

157. TRADE MARKS AND TRADE NAMES—Infringment. —Manufacturer of rubber goods held restrained from using word "Eureka" in connection with noncompetitive goods.—Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co., N. J., 65 Atl. Rep. 870.

158. TRUSTS—Action to Charge Trust Fund.—In an action to charge a trust fund with certain legal services, it is necessary to allege the value thereof, and that plaintiff has not been paid, and that there was due him some amount which the fund was created to secure.—Leyda v. Reavis, Neb., 110 N. W. Rep. 642.

159. TRUSTS—Executors.—A trust relation created between an executor and a legatee as to her legacy is not changed by the discharge of the executor by the probate court, and the distribution of the funds in his hands to the residuary legatees.—Glennon v. Harrell, Ala., 42 So. Rep. 1008.

160. TRUSTS—Real Parties in Interest.—Where an attorney has collected money for his clients, and deposited it in a bank, and sues as trustee for his clients to collect it, the beneficiaries are proper parties as coplaintiffs.—Cunningham v. Bank of Nampa, Idaho, 88 Pac. Rep. 975.

161. VENDOR AND PURCHASER—Compliance With Contract.—A contract for sale of real estate held canceled on the failure of the purchaser to make a payment within a specified time without any further notice from the vendor.—Sleeper v. Bragdon, Wash., 88 Pac. Rep. 1036.

162. VENUE — Several Defendants.—Where there are several persons residing in different counties claiming a fund of a person who has no interest therein, petition of interpleader may be filed against all of them in the county of the residence of any one of them.—Bank of Tifton v. Saussy & Huxford, Ga., 56 S. E. Rep. 513.

163. WAREHOUSEMAN—Refusal to List Taxable Property.—Where a warehouseman refused to furnish the assessor with a list of the property under his control, and the assessor levies an assessment, it will not be set aside on the application of the warehouseman who made such assessment necessary.—Lincoln Transfer Co. v. County Board of Equalization, Neb., 110 N. W. Rep. 724.

164. WATERS AND WATER COURSES—Pollution by City. —City held liable for wrongful discharge of sewage in stream, irrespective of degree of care exercised by it, or contributory negligence of person injured.—Vogt v. City of Grinnell, Iowa, 110 N. W. Rep. 603.

165. WATERS AND WATER COURSES—Wrongful Diversion.—A wrongful diversion of the waters of a stream will be restrained at the instance of a riparian owner, though no actual damages are averred or proved.—Anaheim Union Water Co. v. Fuller, Cal., 88 Pac. Rep. 978.

166. WILLS—Vacating Probate of Lost Will.—Judgment by a court of ordinary admitting to probate a copy of a lost will may be contradicted in a proper proceeding by an heir of the testator in a court which rendered the same as to the facts necessary to give the court jurisdiction.—Davis v. Albritton, Ga., 56 S. E. Rep. 514.

167. WITNESSES—Cross-Examination. — In action for physical and mental suffering sustained incident to expulsion from a passenger train, refusal to permit question to witness held erroneous as invading the right of cross-examination.—Ft. Worth & D. C. Ry. Co. v. Travis, Tex., 99 S. W. Rep. 1141.

168. WITNESSES—Impeachment. — Mere contradiction of a witness, or proof of inconsistent statements, held not an impeachment of the witness, unless the jury believe he has sworn falsely as to a material matter, concerning which he is contradicted, etc.—Chicago City Ry. Co. v. Ryan, Ill., 80 N. E. Rep. 116.